MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5366

ALVA FISHER, *Petitioner,*

v.

STATE OF MONTANA, EX REL, in the matter of the adoption of IVAN FIRECROW, a minor by LEROY RUNSABOVE and JOSEPHINE RUNSABOVE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

MOTION AND BRIEF OF NORTHERN CHEYENNE INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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MOTION OF NORTHERN CHEYENNE INDIAN TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Northern Cheyenne Indian Tribe respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the petitioner has been obtained. The consent of the respondents has been requested but was refused.

The interest of the Northern Cheyenne Indian Tribe arises from the fact that all parties to the adoption proceedings which gave rise to this Northern Cheyenne Indian—State of Montana jurisdiction dispute are members of the Northern Cheyenne Tribe residing within the Northern Cheyenne Reservation in Montana. Moreover, Ivan Firecrow, the minor child who is the subject of the contested state court adoption proceeding, is a ward of the Northern Cheyenne Tribal Court.

The Northern Cheyenne Reservation was created by an executive order issued by President Arthur on November 26, 1884, which directed that the land be "withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians. . . ." 1 Kappler, *Indian Affairs, Laws and Treaties,* 860 (1904).

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. §§ 461, *et seq.,* 48 Stat. 984. The Tribe is organized under a constitution and bylaws approved by the Secretary of the Interior on November 23, 1935. Under the authority granted the Tribe by Congress in the Wheeler-Howard Act, the Tribe has established a tribal court system and has enacted an ordinance providing for exclusive tribal court jurisdiction over adoptions of tribal members. Pursuant to this ordinance, Ivan Firecrow was ordered a ward of the Northern Cheyenne Tribal Court in 1969, five years prior to the contested state court adoption proceeding.

The exercise of state court jurisdiction clashes with the Northern Cheyenne Tribal Court order. Federal supremacy over Indian affairs and the legitimacy of

congressionally sanctioned tribal self-government are swept aside by the opinion of the Montana Supreme Court. The authority of the Northern Cheyenne Indian Tribe and its members to govern reservation activities is likewise undermined.

The interest of the Northern Cheyenne Indian Tribe as amicus curiae arises from the intrusion by the State of Montana, authorized by its supreme court, into an area reserved for federal and tribal jurisdiction. Amicus seeks to file the attached brief to advise the Court of the impact of this decision on the integrity of federal supremacy over Indian affairs and on the Northern Cheyenne Indian Tribe, as well as all other Indian tribes.

Respectfully submitted,

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September, 1975

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BRIEF OF NORTHERN CHEYENNE INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the accompanying Motion of Northern Cheyenne Indian Tribe for Leave to File Brief Amicus Curiae.

STATEMENT OF THE CASE

Amicus hereby adopts the statement as set forth in the Petition.

REASON FOR ALLOWING THE WRIT

The Ruling of the Montana Supreme Court Is in Direct Conflict with Recent Decisions Limiting the Reach of State Jurisdiction Over Indian Affairs.

The Montana Supreme Court held that a Montana state district court had subject matter jurisdiction over a petition for adoption notwithstanding the facts that the child was under an order of the Northern Cheyenne Tribal Court, and the adopting parents, the child and natural mother, all enrolled members of the Northern Cheyenne Tribe, had at all times pertinent to this case resided on the Northern Cheyenne Indian Reservation.

The Montana decision flies directly in the face of more than a century and a half of unequivocal precedent in this Court upholding the status of Indian tribes as:

> . . . 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.' . . . . .

McClanahan v. *Arizona Tax Commission,* 411 U.S. 164, 168 (1973), quoting *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832). As this Court stated in *McClanahan*:

> [i]t followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. . . .

Ibid.

This case is controlled by *McClanahan.* The pertinent federal laws—the executive orders reserving the

Northern Cheyenne lands for the use and occupation of the Northern Cheyenne Tribe, and the Wheeler-Howard Act under which the Tribe governs itself—"preclude extension of state law" on the Reservation. *McClanahan* v. *Arizona Tax Commission, supra* at 175. These federal laws carry forth Congress' responsibility to protect the unique governmental status of American Indian tribes. This Court has given special attention to Congress' concern for strengthening tribal self-government:

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 735. *Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized.* See, e.g., the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477. . . . [Emphasis supplied.]

Williams v. *Lee,* 358 U.S. 217, 220 (1959).

To support its astonishing ruling, the Montana Supreme Court contends that Congress in 25 U.S.C. § 372a, 54 Stat. 746, deprived the Northern Cheyenne Tribal Court of exclusive jurisdiction over reservation children. But 25 U.S.C. § 372a on its face merely provides that a person—whether an Indian or a non-Indian—can be recognized as an heir of an Indian for purposes of probating the Indian's estate if he or she has been duly adopted in either a state or tribal court proceeding. Thus, if the state court has jurisdiction, either because the adopted heir is an Indian residing

off the reservation (outside the tribe's jurisdiction) or is a non-Indian, the Secretary of the Interior in probating the Indian's estate will give full faith and credit to the state court proceeding. The statute is certainly not a congressional grant of jurisdiction over Indian children otherwise subject to exclusive tribal jurisdiction. Indeed, the Washington Supreme Court has rejected the notion that 25 U.S.C. § 372a granted Washington courts adoption jurisdiction over reservation Indians. *State* v. *Superior Court,* 57 W. 181, 356 P.2d 985, 989 (1960).

This is not the first time that the Montana Supreme Court has sought to infer a congressional grant of state jurisdiction over the affairs of reservation Indians. In *Kennerly* v. *District Court,* 400 U.S. 423 (1971), this Court in a per curiam opinion vacated and remanded a ruling of the Montana Supreme Court which held that a member of the Blackfeet Indian Tribe was subject to state court jurisdiction in a proceeding brought by a non-Indian to collect a debt arising out of a reservation transaction. This Court held that Montana had no jurisdiction to resolve a reservation dispute involving a Blackfeet Indian, because Montana had not complied with the congressional enactment under which the state could assume such jurisdiction, 25 U.S.C. §§ 1321-1326, 82 Stat. 78, but instead attempted to rely on a Blackfeet tribal resolution purporting to give the state civil jurisdiction. As in the case of the Blackfeet Reservation, Montana has never assumed civil jurisdiction over the Northern Cheyenne Reservation. And, as in *Kennerly* v. *District Court, supra,* the Montana Supreme Court has developed an impermissible theory for finding a conferral of state jurisdiction over a reservation dispute. There

simply is no basis for concluding that 25 U.S.C. § 372a grants the State of Montana the power to govern the adoption of reservation Indians.

The Northern Cheyenne Tribal Court order has been rendered a nullity by the decision of the Montana Supreme Court. Few matters are more important to Indian tribes than the ability to regulate the domestic relations of members of the reservation. *United States* v. *Quiver,* 241 U.S. 602 (1916); *DeCoteau* v. *District County Court,* —— U.S. ——, 43 L.Ed.2d 300, 326 n.8 (dissent) (1975). Thus, the right of the Northern Cheyenne Tribe as a self-governing political community to determine its own affairs, has been seriously undermined contrary to the dictates of *Williams* v. *Lee,* 358 U.S. 217 (1959).

CONCLUSION

Amicus curiae suggests that it would be appropriate for this Court summarily to vacate and remand the judgment of the Montana Supreme Court in this case as it did four years ago in *Kennerly* v. *District Court, supra.*

Respectfully submitted,

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